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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. EFREN NIEVES GONZALEZ, Defendant and Appellant.	G039071 (Super. Ct. No. 06WF2023) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed.

Peter Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Christine Bergman and Rhonda Cartwright-Ladendorf, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Efren Nieves Gonzalez of possession of a destructive device in a public place (Pen. Code, § 12303.2)[1] possession of a destructive device (§ 12303), and possession of drug paraphernalia (Health & Saf. Code § 11364, subd. (a)). Defendant contends the trial court erred in admitting statements in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), erred in admitting defendant's adoptive admission (Evid. Code, § 1221), erred by instructing the jury with Judicial Council of California Criminal Jury Instructions CALCRIM No. 224 concerning the sufficiency of circumstantial evidence, and erred by denying defendant's motion for mistrial or sanctions premised on the prosecution's late disclosure of evidence. (§ 1054, subd. (b); *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).) For the reasons expressed below, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of July 21, 2006, Huntington Beach police officers stopped a car for a traffic violation. Omar Almejo was the driver and defendant occupied the

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[1] Section 12303.2 provides, "Every person who recklessly or maliciously has in his possession any destructive device or any explosive on a public street or highway, in or near any theater, hall, school, college, church, hotel, other public building, or private habitation, in, on, or near any aircraft, railway passenger train, car, cable road or cable car, vessel engaged in carrying passengers for hire, or other public place ordinarily passed by human beings is guilty of a felony, and shall be punishable by imprisonment in the state prison for a period of two, four, or six years."

Section 12303 provides, "Any person, firm, or corporation who, within this state, possesses any destructive device, other than fixed ammunition of a caliber greater than .60 caliber, except as provided by this chapter, is guilty of a public offense and upon conviction thereof shall be punished by imprisonment in the county jail for a term not to exceed one year, or in state prison, or by a fine not to exceed ten thousand dollars ($10,000) or by both such fine and imprisonment."

All statutory references are to the Penal Code unless otherwise indicated.

front passenger seat. Officer Juan Munoz received Almejo's permission to search the car. Before conducting the search, Munoz directed defendant and Almejo to exit the car and sit on the curb. Munoz assisted Almejo, who had limited use of his legs, into a wheel chair. Sergeant Faust arrived on the scene to assist the investigation.

As Munoz began his search, he found what appeared to be methamphetamine powder on the seat. On the floorboard, between the driver and passenger areas of the bench seat, he found a brown paper bag. Written on the bag with a black marker were the words "Widow Maker Industries." Below this phrase and inscribed in ink were the words, "Situations that absolutely and positively need to be dealt with," and "Fall catalog preview coming soon." The bag contained a three-inch long, clear cylindrical plastic container with a short fuse that looked liked a large firecracker, but turned out to be a potentially deadly, improvised explosive device containing gunpowder and shrapnel.

Munoz placed the device on the ground and asked, "Whose firecracker is it?" Almejo replied the device belonged to both of them and explained their friend "Doug," gave it to them. Defendant nodded his head up and down during Almejo's response. Munoz called the bomb squad to examine the device. A subsequent search under the hood of the car led to discovery of a methamphetamine pipe on top of the windshield wiper reservoir.

Interviewed at the jail a few hours later, defendant agreed to speak after waiving his *Miranda* rights. Defendant stated he phoned Almejo, who he had known for about a year, for a ride home from work. He and Almejo were sitting in Almejo's car when Doug, defendant's coworker, walked up, threw the bag into the driver's side and stated he had a "present for you. Have fun." Defendant stated Doug gave the device to Almejo, but it was "theirs." Defendant explained he and Almejo would take the firecrackers Doug made out to the desert to detonate them. Defendant admitted he had seen the device inside the bag, and conceded the methamphetamine pipe belonged to both

of them. Munoz failed to note in his police report that defendant nodded his head to Almejo's statement, and that defendant admitted the device was given to "them" or was "theirs."

Defendant's testimony contradicted the officer's account in several important respects. Defendant testified he left work to tell Almejo he was clocking out when he spotted Doug, his coworker, talking to Almejo. Almejo asked defendant to check the taillights. While doing so, defendant saw Doug pull a bag out of his car and throw it into Almejo's car, saying, "Have a good time." Almejo put the bag under the seat. Defendant never looked in the bag and did not ask Almejo what was in it. He denied nodding his head when Almejo told Munoz the device in the bag belonged to both of them. He also denied ever telling the officer the device had been given to him. Defendant testified Doug had brought fireworks to work before, and he learned from Doug that Almejo and Doug would detonate the fireworks in the desert. He first saw the device when Munoz took it out of the car and brought it back to show them. Defendant admitted he told Munoz the pipe belonged to him.

Following a trial in January 2007, the jury convicted defendant of the charged offenses. Prohibited from granting probation (§ 12311), the court imposed the mitigated term of two years in prison.

II

DISCUSSION

A. *The Trial Court Did Not Err in Admitting Defendant's Pretrial Admissions*

Defendant contends the investigating officer's failure to advise defendant of his *Miranda* rights before asking about the device required the trial court to exclude evidence of defendant's response. We disagree.

At a pretrial suppression hearing (Evid. Code, § 402), Munoz described the circumstances of his investigation. He testified he activated his lights but not a siren to

pull over Almejo's car. Munoz observed Almejo appeared "really nervous." After obtaining Almejo's consent to search the vehicle, Munoz and Sergeant Faust asked Almejo and defendant to exit the car, and told them to sit on the curb approximately a car length behind the vehicle. Faust stood behind them on the sidewalk. The officers did not draw their guns at any point and the men were not handcuffed until later when they were formally arrested.

Munoz immediately began to search the car. He found a white powdery substance on the driver's seat that he believed to be methamphetamine. There is no evidence Munoz communicated this information to defendant. Munoz also found a brown paper bag on the floorboard between the driver and passenger seat, visible but partially obscured beneath the bench seat. Written on the outside of the bag with a black marker were the words, "Widow Maker Industries." He opened the bag and saw what appeared to be an explosive device. He removed the bag from the car, took the device out of the bag, and placed it on the ground in front of the car.

Munoz asked "who the firecracker belonged to." Almejo said it belonged to both of them and defendant nodded in agreement. At this point, about 15 minutes had elapsed since Munoz had stopped the car. Munoz asked some other questions and Almejo explained the item was a firework given to them by their friend Doug. Defendant mentioned that Doug worked with them and made fireworks and sparklers that they blew up in the desert. Munoz subsequently called the bomb squad. At no point before or during the questioning did the officer tell the men they were under arrest, or that they were free to leave.

The trial court rejected a *Miranda* challenge to Munoz's initial question concerning ownership of the device. The court concluded defendant was in custody, but

there was no interrogation, just "preliminary questions." The court further explained, "[T]he officer is looking at this thing and says, 'What is it' to the driver and the driver says, 'it's a firework.' So why wouldn't that initial conversation be more in the nature of preliminary investigation rather than actual interrogation?" The court excluded the answers to subsequent questions at the scene, explaining "as the questioning becomes more focused, it becomes interrogation."

The prosecution may not use statements elicited by the police during custodial interrogation unless defendant validly waives his *Miranda* rights. (*People v. Mickey* (1991) 54 Cal.3d 612, 647-648.) Custodial interrogation occurs when a reasonable person in the suspect's position would feel that his freedom of action is restrained to a "'degree associated with formal arrest.'" (*Berkemer v. McCarty* (1984) 468 U.S. 420, 440 (*Berkemer*); *California v. Beheler* (1983) 463 U.S. 1121, 1125.) Whether an individual is in custody is a mixed question of law and fact. (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403 (*Pilster*).) On review, we defer to the trial court's findings of fact to the extent they are supported by substantial evidence, but independently evaluate whether the defendant was in custody where the facts surrounding custody are undisputed. (*Ibid*.)

In *Berkemer*, the United States Supreme Court considered whether "the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered 'custodial interrogation.'" (*Berkemer, supra,* 468 U.S. at p. 435.) The court recognized that few motorists would feel free "to leave the scene of a traffic stop without being told they might do so." (*Id.* at p. 436.) Although stopping a vehicle and detaining its occupants constitutes a seizure within the meaning of the Fourth Amendment (*id*. at pp. 436-437), the court held the "noncoercive aspect of ordinary traffic stops prompts us

to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*." (*Id.* at p. 440, italics added.) The court explained that the "detention of a motorist pursuant to a traffic stop is presumptively temporary and brief" (*id.* at p. 437) and that "circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police." (*Id.* at p. 438.) But "[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*." (*Id.* at p. 440, italics added.)

"Custody determinations are resolved by an objective standard: Would a reasonable person interpret the restraints used by the police as tantamount to a formal arrest? [Citations.] [Fn. omitted.] The totality of the circumstances surrounding an incident must be considered as a whole. [Citation.] Although no one factor is controlling, the following circumstances should be considered: '(1) [W]hether the suspect has been formally arrested; (2) absent formal arrest, the length of detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of [the] questioning.' [Citation.]" (*Pilster*, *supra*, 138 Cal.App.4th at p. 1403.) "Additional factors are whether the suspect agreed to the interview and was informed he or she could terminate the questioning, whether the police informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement during the interview, and whether the police officers dominated and controlled the interrogation or were 'aggressive, confrontational, and/or accusatory,' whether they pressured the suspect, and whether the suspect was arrested at the conclusion of the interview. [Citation.]" (*Id.* at pp. 1403-1404.)

Although the issue is close, we conclude defendant was not in custody when Munoz initially asked "whose firecracker is it?" The question occurred after a consensual search following an otherwise routine traffic stop. Significantly, Munoz had not handcuffed defendant or Almejo, which is a distinguishing feature of a formal arrest. (*Pilster, supra,* 138 Cal.App.4th at pp. 1404-1405.) The detention and questioning took place in public view and the officers did not unduly prolong the investigation before asking the question. The officers did not draw their weapons, make any threats or engage in any aggressive or confrontational behavior. The officers did not outnumber the suspects, and did not accuse defendant and Almejo of any crime or confront them with evidence suggesting the officers believed a crime had occurred. Munoz did not arrest defendant immediately after questioning the men about the device. Munoz's description of the device as a "firecracker" would not lead a reasonable person to believe he was under arrest for possession of an explosive. Indeed, the officers did not arrest the men until the bomb squad had conducted its investigation, which took place after Munoz's initial inquiries.

We agree with defendant he and his cohort could not have reasonably believed they were free to leave while they sat on the curb with Sergeant Faust standing behind them, but as we explained above, that is not the test. Because a reasonable person in defendant's position would not believe he was restrained to the degree associated with a formal arrest, *Miranda* warnings were not required.

Even assuming the trial court should have excluded the evidence, any error was harmless beyond a reasonable doubt. Defendant does not contest the admission of his *Mirandarized* statements to Munoz at the jail. At trial, he denied nodding his head in assent to Almejo's statement the device belonged to both of them, and denied telling

Munoz at the jail that Doug had given him the device. In contrast, Munoz testified defendant admitted Doug had given the device to him and Almejo. Thus, the primary issue for the jury was to resolve the credibility issue between Munoz and defendant. Under these circumstances, evidence defendant nodded his head in agreement to Almejo's statement was merely cumulative to defendant's express admissions at the jail and therefore could not have prejudiced defendant in the jury's evaluation of his credibility.

B. *The Trial Court Properly Admitted Evidence of Defendant's Response to Almejo's Statement*

The trial court overruled a hearsay objection to Munoz's testimony that defendant nodded while Almejo stated the device belonged to both of them. Defendant contends defendant's conduct did not constitute an adoptive admission because Almejo's statement did not accuse defendant of a crime, and asserts admission was erroneous because of the "nebulous nature of the statement by Almejo, and the response by [defendant]." The contention is not persuasive.

Evidence Code section 1221 provides, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." A statement is admissible as an adoptive admission if sufficient evidence shows the defendant heard and understood the statement and that it would call for a response, and by words or conduct adopted the statement as true. (*People v. Davis* (2005) 36 Cal.4th 510, 535.)

Here, sufficient evidence supports the trial court's decision to admit the evidence. By nodding his head, defendant manifested his adoption of Almejo's statement the device belonged to both of them, just as evidence that he shook his head or said "no" would have reflected the contrary. We reject defendant's argument Almejo's statement

and defendant's response were too nebulous to admit into evidence. Defendant's assent the device was "his" tended to prove he knew of its presence in the car, an element demonstrating constructive possession. This alone supported admission of the evidence. Consequently, defendant's argument the admission did not resolve the question whether he manufactured, assembled, touched or examined the item is beside the point. We also reject defendant's argument that his response was not an adoptive admission because Munoz did not accuse him of a crime. By nodding his head, defendant adopted Almejo's statement, not the officer's inquiry. Of course, whether defendant's conduct actually constituted an adoptive admission was a question for the jury to decide. (*People v. Geier* (2007) 41 Cal.4th 555, 590.) We discern no error in admitting the evidence.

C. *The Trial Court Did Not Err in Declining to Instruct on CALCRIM No. 225*

Defendant argues the trial court erred in giving CALCRIM No. 224 (see also CALJIC No. 2.01) rather than CALCRIM No. 225 (see CALJIC No. 2.02). These alternative instructions instruct the jury on the use of circumstantial evidence to establish the elements of the offense. CALCRIM No. 225 states the following: "Circumstantial Evidence: Intent or Mental State [¶] The People must prove not only that the defendant did the acts charged, but also that (he/she) acted with a particular (intent/[and/or] mental state). The instruction for (the/each) crime [and allegation] explains the (intent/[and/or] mental state) required. [¶] A[n] (intent/[and/or] mental state) may be proved by circumstantial evidence. [¶] Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. [¶] Also, before you may rely on circumstantial evidence to conclude that the defendant had the required (intent/[and/or] mental state), you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required (intent/[and/or] mental state). If you can draw two or more reasonable

conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required (intent/[and/or] mental state) and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required (intent/[and/or] mental state) was not proved by the circumstantial evidence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable." CALCRIM No. 224, which the trial court provided, instructs on the same concept as CALCRIM No. 225 in substantially the same language, but it applies generally to establishing any element of guilt through circumstantial evidence.[2]

The trial court need not give the specific circumstantial evidence instruction on mental state "unless the only element of the offense that rests substantially or entirely upon circumstantial evidence is that of specific intent or mental state." (*People v. Hughes* (2002) 27 Cal.4th 287, 347.) Here, each of the charged crimes required proof of possession, which generally may be shown through possession that is either physical or constructive. To prove constructive possession, the prosecution relied on circumstantial evidence, arguing that the jury should draw an inference of guilt from defendant's proximity to the device, its placement under the seat, and his statements at the scene and at the jail. Because defendant's mental state was not the only element resting upon

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[2] CALCRIM No. 224 states: "Circumstantial Evidence: Sufficiency of Evidence [¶] Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.

"Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

circumstantial evidence, the trial court did not err by providing the more general instruction encompassed in CALCRIM No. 224.

D. *The Trial Court Did Not Err in Denying Defendant's Motion to Sanction the Prosecution*

Defendant contends the trial court erred in rejecting defendant's motion for sanctions against the prosecution based on the prosecution's discovery violations. We do not find the contention persuasive.

After the jury was sworn, the prosecution received and disclosed a supplemental report, dated September 29, 2006, from the Orange County Crime Lab reflecting that a fingerprint analysis had been performed on the bag and device. The report noted that five latent prints were lifted from the bag, but only one workable latent print was developed, and it did not match either defendant or Almejo. Defendant subsequently moved for dismissal or mistrial based on the late disclosure. Counsel argued that had she known about the evidence, she could have hired an expert to examine the prints to determine whether the workable print matched Almejo, or whether the "other . . . prints . . . described as not being suitable for comparison . . . were . . . suitable and could have been compared to [her] client." Alternatively, she asked the court to limit information conveyed to the jury "to specifically the one print," and admonish the jury that the prosecutor provided late exculpatory discovery.

The court concluded the prosecution unintentionally violated its discovery obligations. The court stated it would have excluded the evidence had it been incriminatory, and would still exclude the evidence if defendant requested this remedy. The court noted if the defense chose to have the late evidence excluded, it would permit defense counsel to argue to the jury the prosecution failed to produce any scientific evidence linking defendant to the bag. But the court determined the discovery violation did not warrant a mistrial or dismissal. The court initially agreed to instruct the jury on

the prosecution's failure to provide timely discovery, based on CALCRIM No. 306.[3] Because defense counsel accepted the court's offer to exclude the evidence, the court later declined to provide CALCRIM No. 306, stating it would confuse jurors to comment on evidence the parties did not introduce.

A criminal defendant has a statutory and constitutional right to disclosure of exculpatory evidence, and the prosecution must provide this in a timely manner. (§ 1054.1, subds. (e), (f); *Brady, supra*, 373 U.S. 83; *People v. Zambrano* (2007) 41 Cal.4th 1082 [*Brady* obligation includes evidence known to others acting on the government's behalf including the police].)[4] The evidence need not exonerate the defendant; disclosure is required if the evidence is *both* "favorable" and "material." (*Brady*, at pp. 86-88.) As our Supreme Court has explained: "Evidence would have been *favorable* if it would have helped the defendant or hurt the prosecution, as by impeaching one of its witnesses. Evidence would have been *material* only if there is a reasonable probability that, had it been disclosed to the defense, the result would have been different." (*People v. Dickey* (2005) 35 Cal.4th 884, 907; accord, *Kyles v. Whitley* (1995)

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[3] CALCRIM No. 306 (Untimely Disclosure of Evidence) provides, in pertinent part: "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all other evidence to counter opposing evidence or to receive a fair trial. In this case the People failed to disclose the fingerprint report evidence within the legal time period. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure."

[4] Discovery rules generally require the parties to make disclosures at least 30 days prior to the trial, or immediately if discovered or obtained within 30 days of trial. (§ 1054.7; cf. *U.S. v. Higgins* (7th Cir. 1996) 75 F.3d 332 [*Brady* does not require disclosure before trial but disclosure must afford defendant enough time to make use of the material].) Where a party has not complied with section 1054.1, the court may make any necessary order, including immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness, or the presentation of real evidence, continuance of the matter, any other lawful order, and may advise the jury of any failure or refusal to disclose and of any untimely disclosure. (§ 1054.5, subd. (b).)

514 U.S. 419, 434 ["touchstone of materiality is a 'reasonable probability' of a different result"].) "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence [s]he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (*Kyles,* at p. 434.)

No *Brady* violation occurs if the evidence is disclosed in time for the defendant to make effective use of it at trial, even though the defendant would have preferred to receive the disclosures at an earlier time. (See *United States v. Anderson* (9th Cir. 2004) 371 F.3d 606, 610.) A defendant complaining of untimely disclosure must show prejudice from the delay. (*People v. Jenkins* (2000) 22 Cal.4th 900, 950.)

Here, defendant has not shown prejudice from the delay in producing the lab report. To establish prejudice, defendant must show a continuance would not have cured the harm. (*People v. Pinholster* (1992) 1 Cal.4th 865, 941.) Defendant claims a continuance was not feasible because the trial was in its "last phase" and a continuance would have required a "delay of weeks," but offers no support for this bald assertion. Defendant had not yet begun its case-in-chief, and the trial court had expressed its concern that defendant receive "an opportunity to thoroughly present any exculpatory material." But defendant failed to request a continuance to examine the latent prints. Defendant's claim that the trial court would have denied a continuance so defendant could retain an expert to reexamine the latent prints is based on nothing more than speculation. Although the prosecution's failure to provide earlier discovery violated its obligation under California's discovery statute (§ 1054 et seq.), we conclude defendant has failed to carry his burden in demonstrating the prosecution violated its disclosure obligations under *Brady*.

Even if we were to agree that the prosecutor failed to make a timely *Brady* disclosure, we conclude the belatedly disclosed report was not material. The crime lab reported the identifiable latent print did not match defendant or Almejo. Other

individuals handled the bag, however, including defendant's friend Doug, Munoz, and investigators from the bomb squad. Moreover, the prosecution based its case against defendant on a theory of constructive possession, and never claimed defendant exercised physical possession over the bag and its contents. Defendant also denied handling the bag. Consequently, the evidence concerning the latent print, although favorable to defendant, was not material because it does not show a different result was reasonably probable. (*Strickler v. Greene* (1999) 527 U.S. 263, 281 [materiality requires reasonable probability the suppressed evidence would have produced a different verdict].)

Defendant also complains the trial court's failure to grant his motion for sanctions against the prosecution violated his right to due process and denied him remedies available under section 1054, subdivision (b). Specifically, defendant asserts he was entitled to a mistrial or a dismissal. Defendant's argument is meritless.

Trial courts have broad discretion in determining the appropriate sanction for discovery abuse. (*People v. Jenkins* (2000) 22 Cal.4th 900, 951.) Here, the trial court gave defense counsel the option of introducing evidence of the lab report or excluding the report and being allowed to argue that the prosecution failed to produce fingerprint evidence linking defendant to the bag. The trial court's actions ameliorated any potential harm to defendant from the late report. As we noted *ante*, defendant has not shown prejudice. Under these circumstances, the particular remedy the trial court adopted was within its discretion. (See *People v. Cook* (2006) 39 Cal.4th 566, 586 [prosecution's delayed disclosure of witness interview until after trial began did not require reversal where defendant failed to show prejudice].)

III

DISPOSITION

The judgment of the trial court is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, ACTING P. J.

IKOLA, J.